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Protasco Bhd v PT Anglo Slavic Utama & Ors

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-362–09 OF 2014
AZIZUL AZMI ADNAN J
15 MARCH 2019

C *Civil Procedure — Discovery — Discovery of documents — Application for order pursuant to s 7 of the Bankers' Books (Evidence) Act 1949 — Whether application for inspection of banker's books ought to be allowed — Whether test of relevancy fulfilled — Whether application an abuse of process — Whether court had jurisdiction to grant orders prayed for — Whether application for discovery*
D *fishing expedition — Whether legal burden of proof shifted*

Evidence — Documentary evidence — Bankers' books — Discovery and admissibility of — Application for order pursuant to s 7 of the Bankers' Books
E *(Evidence) Act 1949 — Discovery and admissibility of documents obtained under s 7 of the Bankers' Books (Evidence) Act 1949 — Whether copies of bankers' books to be admissible subject to ss 4 and 5 of the Bankers' Books (Evidence) Act 1949 and the rules relating to relevancy and admissibility — Bankers' Books (Evidence) Act 1949 ss 4, 5 & 7*
F

Words and phrases — Bankers' Books (Evidence) Act 1949 — Definition of 'banker's books' under Bankers' Books (Evidence) Act 1949 — Whether document sought to be adduced came within definition of 'banker's books'

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This was a decision of the learned High Court judge in relation to two applications made by the plaintiff. The first being encl 307 to inspect and obtain copies of certain documents in the possession of Malayan Banking Bhd, CIMB Bank Bhd, and CIMB Islamic Bank Bhd ('the banks'). The second
H being encl 395 being an application for the court to determine the admissibility of documents disclosed pursuant to the orders made. The plaintiff was a publicly listed company, the second and third defendants were former directors of the plaintiff. The plaintiff alleged that the second and third defendant had fraudulently caused the plaintiff to enter into a transaction to acquire shares in
I a company that purportedly owned oil exploration rights in Indonesia from the first defendant. The second and third defendant had personal interest in the first defendant which they failed to disclose to the plaintiff in breach of the fiduciary duties as directors. Shortly after this suit was commenced, a company known as Kingdom Seekers Ventures Sdn Bhd sued the plaintiff. In its

statement of claim, Kingdom Seekers pleaded that certain companies were related. The plaintiff contended to be the second defendants' corporate vehicle. The second defendant held a press conference where he stated that monies paid by the plaintiff in the share acquisition had been paid to some of those related and associate companies. Acting on the information in the press conference and the statement of claim, the plaintiff sought and obtained an order pursuant to s 7 of the Bankers' Books (Evidence) Act 1949 ('the Act'). The information obtained from the first s 7 order led the plaintiff to make a further application being encl 307. The second and third defendant were resisting encl 307 on the grounds that: (a) it was misconceived and an abuse of process, as the court did not have jurisdiction to grant the orders prayed for; (b) the application was a fishing expedition; and (c) the application sought to reverse the burden of proof which was impermissible in law.

Held:

(1) The scope of the Act was limited to 'banker's book' which was defined in a non-exhaustive way, but it was clear that the words 'other book' must be read ejusdem generis with 'ledger', 'day book', 'cash book', and 'account book'. The court took an expansive view of the word 'books' within the definition of 'banker's books' under the Act. The expression was wide enough to encompass any matter coming within the definition of 'document' within the meaning of the Evidence Act 1950. For a document to come within the meaning of banker's book it: (a) must comprise any transaction record that was generated by the bank; or (b) must be a document which the bank maintained; for the purposes of accounting, audit, reconciliation or reporting (see paras 16 & 37–38).

(2) The principal test in granting a s 7 order was one of relevancy. The plaintiff's assertions must be assumed to be true in assessing the relevance of the information sought to be obtained by the order of discovery or inspection. Applying the test of relevancy to the facts of the application in encl 307, the court was of the view that the inspection of the banker's books ought to be allowed, as it would go towards establishing the plaintiff's case against the second and third defendants. The information obtained from an inspection of the accounts and other books held by the banks would establish the money trail and would determine whether or not the money paid by the plaintiff under the share acquisition had found its way back into the accounts controlled by the second and third defendants. For this reason, the court allowed encl 307 (see paras 49–50).

(3) The plaintiff here was well entitled to seek inspection of the banker's books, and to make copies of entries in such books, in order to prove its assertion regarding the flow of funds back to the second and third defendants. This construction was supported by the plain words of s 7 of the Act, which in no uncertain terms provide for the right to inspect

banker's books and to take copies of entries in such books. If the document that was sought to be discovered did not come within the definition of banker's books the applicant must apply for third party discovery against the bank in question, or to subpoena an officer of the bank at trial. If what was sought was comprised within the definition of banker's books, then the only way in which the plaintiff was able to obtain a copy of that document was by way of an application under s 7. For the above reasons, the court disagreed that the court did not have the jurisdiction to grant the orders prayed for in encl 307 (see paras 58–59 & 61–62).

(4) Having examined the statement of claim, the court was of the view that there were sufficient pleaded facts to show that the plaintiffs did in fact had a case that may be aided by an order of discovery, and that, as a consequence, the application for discovery was not a mere fishing exercise. In addition, the order sought after under s 7 of the Act was not sought against the defendants, but rather third parties. If it was not the defendants who would be subjected to the court order, then it could never be said that the legal burden of proof had shifted (see paras 66 & 71).

(5) In relation to the question of admissibility of the documents received pursuant to an order under s 7 of the Act, the court could not allow the relevant documents to be admitted into evidence without first addressing the following matters: (a) the court must first make a determination whether a document sought to be adduced came within the definition of 'banker's books'. Evidence may well have to be led as to the purpose for which the bank had generated, or maintained a record of, the document in question; and (b) the plaintiff must satisfy the court that: (i) in the case of a copy of an entry in a bankers book, the requirements of ss 4 and 5 of the Act have been fulfilled; and (ii) in any other case, the requirements relating to proof of a document and its relevancy and admissibility have been fulfilled (see para 73).

[Bahasa Malaysia summary

Ini merupakan keputusan hakim Mahkamah Tinggi yang terpelajar berhubung dengan dua permohonan yang di buat oleh plaintif. Yang pertamanya merupakan lampiran 307 untuk memeriksa dan mendapatkan salinan dokumen-dokumen tertentu yang berada dalam milikan Malayan Banking Bhd, CIMB Bank Bhd, dan CIMB Islamic Bank Bhd ('bank-bank tersebut'). Keduanya merupakan lampiran 395 yang merupakan permohonan untuk mahkamah memutuskan kebolehterimaan dokumen yang dikemukakan selaras dengan perintah yang diberikan. Plaintif merupakan satu syarikat disenarai awam, defendan kedua dan ketiga merupakan bekas pengarah plaintif. Plaintif menyatakan bahawa defendan kedua dan ketiga telah secara tipuan menyebabkan plaintif memasuki satu transaksi untuk

mendapatkan syer dalam satu syarikat yang kononnya memiliki hak 'oil exploration' di Indonesia daripada defendan pertama. Defendan kedua dan ketiga mempunyai kepentingan peribadi dengan defendan pertama yang mana mereka gagal untuk memaklumkan kepada plaintif yang melanggar duti fidusiari mereka sebagai pengarah. Sejurus selepas saman ini dimulakan, satu syarikat yang dikenali sebagai Kingdom Seekers Ventures Sdn Bhd telah menyaman plaintif. Dalam penyataan tuntutanya, Kingdom Seekers plid bahawa beberapa syarikat adalah berkaitan. Plaintif menyatakan bahawa Kingdom Seekers adalah kenderaan korporat defendan kedua. Defendan kedua telah mengadakan satu sidang akhbar yang mana dinyatakan bahawa wang yang dibayar oleh plaintif dalam pemerolehan syer telah dibayar kepada beberapa syarikat yang berkaitan dan syarikat bersekutu. Bertindak atas maklumat dalam sidang akhbar dan penyataan tuntutan tersebut, plaintif meminta dan mendapat satu perintah dibawah s 7 Akta Buku Jurubank (Keterangan) 1949 ('Akta tersebut'). Maklumat yang diterima daripada perintah s 7 yang pertama, telah membawa plaintif untuk membuat permohonan lanjut yakni lampiran 307. Defendan kedua dan ketiga menentang lampiran 307 atas alasan bahawa: (a) ianya adalah salah dan merupakan penyalahgunaan proses mahkamah, kerana Mahkamah tiada bidangkuasa untuk meberikan perintah yang dipohon; (b) permohonan tersebut cuba untuk menerbalikkan beban pembuktian yang tidak dibenarkan undang-undang.

Diputuskan:

(1) Skop Akta tersebut adalah terhad kepada 'buku jurubank' yang didefinisikan dalam cara yang tidak terhad, tapi ianya adalah jelas bahawa perkataan 'buku lain' kena dibaca esjudem generis dengan 'lejar', 'buku harian', 'buku tunai', dan buku akaun'. Mahkamah mengambil pandangan luas atas perkataan 'buku' dalam definisi 'buku jurubank' di bawah akta tersebut. Ungkapan tersebut adalah cukup luas untuk merangkumi apa-apa perkara yang datang dibawah definisi 'dokumen' di bawah makna Akta Keterangan 1950. Untuk satu dokumen datang di dalam makna 'buku jurubank' ia: (a) harus termasuk apa-apa rekod transaksi yang dikeluarkan oleh bank; atau (b) hendaklah satu dokumen yang dikekalkan oleh bank untuk tujuan akaunting, audit, penyesuaian atau pelaporan (lihat perenggan 16 & 37–38).

(2) Ujian utama dalam memberikan satu perintah s 7 adalah kerelevanan. Pengataan-pengataan plaintif perlu dianggap benar dalam menentukan kerelevanan maklumat yang hendak didapatkan melalui perintah penemuan atau pemeriksaan. Menggunakan ujian kerelevanan kepada fakta permohonan dalam lampiran 307, mahkamah berpandangan bahawa pemeriksaan buku jurubank hendaklah dibenarkan, kerana ianya akan membawa kepada pembuktian kes plaintif terhadap defendan kedua dan ketiga. Maklumat yang daripada pemeriksaan akaun dan

buku lain yang disimpan oleh bank-bank akan membuktikan jejak wang dan menentukan sama ada wang dibayar oleh plaintif di bawah pemerolehan syer telah ke akaun yang dikawal oleh defendan kedua dan ketiga. Atas alasan ini, mahkamah membenarkan lampiran 307 (lihat perenggan 49–50).

(3) Plaintif berhak untuk mendapatkan pemeriksaan buku jurubank, dan untuk membuat salinan catatan dalam buku tersebut. Sekiranya dokumen yang hendak dijumpai tidak datang di bawah maksud buku jurubank pemohon hendaklah memohon untuk penemuan pihak ketiga terhadap bank yang berkenaan, atau untuk sapina pegawai bank sewaktu perbicaraan. Sekiranya apa yang diminta termasuk di bawah definisi buku jurubank, satu-satunya cara untuk plaintif mendapatkan salinan dokumen tersebut adalah melalui permohonan di bawah s 7. Berdasarkan alasan-alasan di atas, mahkamah tidak bersetuju bahawa mahkamah tiada bidang kuasa untuk memberikan perintah yang dipohon dalam lampiran 307 (lihat perenggan 58–59 & 61–62).

(4) Setelah meneliti penyataan tuntutan, mahkamah berpendapat bahawa wujud fakta yang diplid yang mencukupi untuk menunjukan bahawa plainitf mempunyai satu kes yang boleh dibantu melalui satu perintah penemuan, dan, oleh itu, satu permohonan untuk penemuan bukanlah satu 'fishing exercise'. Lanjutan itu, perintah yang dipohon di bawah s 7 akta tersebut, tidak dipohon terhadap defendan-defendan tetapi pihak ketiga. Sekiranya defendan-defendan tidak dikenakan perintah mahkamah tersebut, maka ianya tidak boleh mengatakan bahawa beban pembuktian undang-undang telah berpindah (lihat perenggan 66 & 71).

(5) Berkenaan dengan persoalan kebolehteriman dokumen-dokumen yang diterima melalui perintah di bawah s 7 akta tersebut, mahkamah tidak boleh membenarkan dokumen-dokumen yang relevan diterima sebagai keterangan tanpa pertama sekali melihat kepada perkara-perkara berikut: (a) mahkamah pertama sekali harus memutuskan sama ada dokumen-dokumen yang dipohon untuk dikemukakan datang dibawah makna 'buku jurubank'. Keterangan boleh dikemukakan bahawa tujuan yang mana bank telah mengeluarkan, atau menyimpan rekod dokumen tersebut; dan (b) plaintif hendaklah memuaskan mahkamah bahawa: (i) dalam kes yang mana salinan catatan dalam buku jurubank, keperluan ss 4 dan 5 akta tersebut dipenuhi; dan (ii) dalam kes lain, keperluan berkenaan dengan pembuktian dokumen dan kerelevanannya dan kebolehterimapakaiannya telah dipenuhi (lihat perenggan 73).]

Notes

For cases on bankers' books, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1541–1550.

For cases on discovery of documents, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3445–3459.

Cases referred to

Arnott v Hayes (1887) 36 Ch D 731, CA (refd)
Barker v Wilson [1980] 1 WLR 884, QBD (refd)
Douglas v Pindling [1996] AC 890, PC (refd)
Extreme System Sdn Bhd v Ho Hup Construction Company Bhd & Ors [2010] MLJU 1608; [2011] 10 CLJ 186; [2010] 11 MLRH 820, HC (refd)
Idiots' Asylum v Handysides (1906) 22 TLR 573, CA (refd)
Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors [2003] 5 MLJ 276; [2003] 2 AMR 70; [2003] 5 CLJ 436; [2002] 3 MLRH 877, HC (distd)
Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (T/A JB International) [1990] 2 MLJ 282; [1989] 3 MLRH 223, HC (refd)
Howglen Ltd, Re [2001] 1 All ER 376, Ch D (folld)
South Staffordshire Tramways Company v Ebbsmith [1895] 2 QB 669, CA (consd)
WA Pines Pty Ltd v Bannerman (1980) 30 ALR 559, FC (distd)
Williams v Williams [1988] 1 QB 161, CA (refd)
Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581; [1993] 4 MLRH 380, HC (refd)

Legislation referred to

Bankers' Book (Evidence) Act 1949 ss 3, 4, 5, 6, 7
Bankers' Book Evidence Act 1879 [UK] s 6
Evidence Act 1950 ss 17, 21, 62, 90A, 90A(2), 130(3)
Rules of Court 2012 O 24 r 7A, O 24 r 7A(2)

Peter Skelchy (S Sivaneindiren, Joycelyn Teoh and Melissa Loy with him) (Cheah Teh & Su) for the plaintiff.
Malek Imtiaz (R Jayasingam, Ng Keng Yang, Yvonne Lim and Khoo Suk Chyi with him) (BH Lawrence & Co) for the second and third defendant.
Arham Rahimy Hariri (Edlin Ghazaly & Assoc) for CIMB Bank Bhd and CIMB Islamic Bank Bhd.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The plaintiff made an application in encl 307 under the Bankers' Book (Evidence) Act 1949 to inspect and obtain copies of certain documents in the possession of Malayan Banking Bhd, CIMB Bank Bhd and CIMB Islamic Bank Bhd ('the banks'). The plaintiff contended that these documents establish the trail of payments of money that ultimately wound its way back into the

pockets of the second and third defendants.

[2] I allowed this application on 7 January 2019, for reasons that I will explain in this judgment.

[3] The plaintiff made a subsequent application in encl 395 for the court to determine the admissibility of certain documents disclosed pursuant to the order of 7 January 2019, and a prior order of 25 June 2018. The applicable principles relating to the admissibility of documents disclosed pursuant to these orders are also explained in this judgment.

BACKGROUND

[4] For the present purposes, the plaintiff's action in this case may be summarised briefly as follows.

[5] The plaintiff is a publicly listed company. The second and third defendants are former directors of the plaintiff. The plaintiff alleges that they had fraudulently caused the plaintiff to enter into a transaction to acquire shares in a company that purportedly owned oil exploration rights in Indonesia from the first defendant. The plaintiff alleges that the second and third defendants had personal interests in (among others) the first defendant, which they failed to disclose to the plaintiff in breach of their fiduciary duty as directors.

[6] The plaintiff seeks, among others, to recover the sum of USD27m from the second and third defendants.

[7] Shortly after this suit was commenced in 2014, a company known as Kingdom Seekers Ventures Sdn Bhd sued the plaintiff. In its statement of claim, Kingdom Seekers pleaded that certain companies were related and associate companies accustomed to dealing with one another. The day after this suit was filed, the second defendant in the present action, Dato' Larry Tey, held a press conference at which he stated that the moneys paid by the plaintiff in the share acquisition had been paid to some of those related and associate companies.

[8] The plaintiff contends that Kingdom Seekers is Dato' Tey's corporate vehicle.

[9] Acting upon the information contained in that statement of claim and in the press statement issued by Dato' Tey, the plaintiff sought and obtained an order pursuant to s 7 of the Bankers' Book (Evidence) Act 1949.

[10] The information obtained from this first s 7 order led the plaintiff to make a further application in encl 307 under the Bankers' Book (Evidence) Act 1949, the object of which was to ascertain where the moneys had flowed from the related and associate companies. According to the plaintiff, the flow of funds is relevant for the purposes of establishing the plaintiff's claim and its contention that the funds ultimately found their way back into the pockets of the second and third defendants.

[11] The second and third defendants resisted the application for discovery on the following three grounds, which I have summarised from the written submissions of counsel:

(a) it was argued that the application under the Bankers' Book (Evidence) Act 1949 was misconceived and an abuse of process, having regard to the legislative intent of the Bankers' Book (Evidence) Act 1949 and the provisions for third party discovery under O 24 r 7A of the Rules of Court 2012. Because of this — it was argued — the court did not have the jurisdiction to grant the orders prayed for;

(b) it was argued that the application for discovery was a mere fishing expedition; and

(c) finally, it was contended that the plaintiff has, by the application under the Bankers' Book (Evidence) Act 1949, sought in effect to reverse the burden of proof, which is impermissible in law.

ANALYSIS

The scheme of the Bankers' Book (Evidence) Act 1949 generally

[12] The relevant provisions of the Bankers' Book (Evidence) Act 1949 are reproduced below, for ease of reference:

> 'banker's book' includes any ledger, day book, cash book, account book and any other book used in the ordinary business of a bank;
>
> Section 3 Mode of proof of entries in bankers' books.
>
> Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry and of the matters, transactions and accounts therein recorded.
>
> Section 4 Proof that book is a banker's book.
>
> (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

(2) Such proof may be given by an officer of the bank, and may be given orally or by an affidavit sworn before any magistrate or person authorized to take affidavits.

Section 5 Verification of copy.

(1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that the copy has been examined with the original entry and is correct.

(2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any magistrate or person authorized to take affidavits.

Section 6 Case in which officer of bank not compellable to produce books, etc.

An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special cause.

Section 7 Court or Judge may order inspection.

(1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

(2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed unless the Court or Judge otherwise directs.

[13] The intent of the Bankers' Book (Evidence) Act 1949 is to relieve a bank from the need to produce the original of its books, and thus reducing the potential disruption that may be caused to the business of the bank, where otherwise its books may be in evidence before a court pursuant to a *subpoena duces tecum* and thus inaccessible for the purposes of the bank's day-to-day business.

[14] Of course, this legislation has its genesis in 19th Century Britain. Much has changed since then, not least the computerisation of banking records. Together with amendments to the Evidence Act 1950 effected in 1993, there will now be little, if any, disruption that will be caused to a bank for it to produce the records of the transactions undertaken by it. Most of the records kept by the bank, and certainly all of its transaction records, will be in electronic form. In 1993, the definition of 'document' in the Evidence Act 1950 was amended to include electronic data, and explanation 3 was introduced to s 62 to provide that any print out of that data would be admissible as primary evidence. As a result of these amendments, a physical representation of banking records can be generated quite literally at the touch of a button, without the risk of disrupting the ordinary business of the bank.

That physical representation — usually in the form of a statement, ledger or other paper document recording banking entries, would not only be primary evidence under s 62, but would also be admissible without the need to call the maker of the document, pursuant to s 90A of the Evidence Act 1950. The maker of a data entry in the records of a bank may well be a data entry clerk whose identity will have been lost in the mists of time. That, however, does not matter, as policy dictates that there ought to be a presumption of reliability in the data kept by the bank in the ordinary course of its business. This, in part, is the objective of s 90A, though its ambit extends well beyond banks. Section 90A operates as an exception to the exclusionary rule against hearsay, and relieves a party from having to call the maker of the computer-generated document, subject to the fulfilment of certain conditions.

[15] Despite the advancements in record-keeping practices, we are still tasked with having to make sense of the application of 19th Century rules of evidence to present day circumstances.

[16] The first observation that may be made of the Bankers' Book (Evidence) Act 1949 is that its scope is limited to 'banker's books'. It is defined in a non-exhaustive way, but it is clear that the words 'other book' must be read *ejusdem generis* with 'ledger', 'day book', 'cash book' and 'account book'. This is considered in further detail at paras 26 *et seq*, *post*.

[17] Section 3 of the Bankers' Book (Evidence) Act 1949 allows copies of any entry in a banker's book to be admissible without the need for the original to be adduced. Copies will be 'prima facie' evidence of the entry, which means that evidence may be led to show that the entry is, for whatever reason, inaccurate. This copy will only be admissible if the requirements of ss 4 and 5 are complied with. Section 4 provides that an officer of the bank must either provide oral testimony or depose an affidavit stating that:

(a) the book was one of the ordinary books of the bank;

(b) the entry was made in the usual and ordinary course of business; and

(c) that book is in the custody or control of the bank.

[18] Section 5 in turn provides that the copy must have been compared with the original and confirmed as correct by any person. That person must testify either in person or through an affidavit that he has done so.

[19] It is only once ss 4 and 5 are complied with that a copy of any entry in a banker's book may be admitted into evidence.

[20] Section 3 must be understood in the context modern banking practice and the provisions of the Evidence Act 1950. A print-out from a banker's book (and it will be remembered that a banker's book, as explained, will in the vast majority of cases now be in electronic form) will itself be an original. This original would of course be admissible as primary evidence, without the need to comply with ss 4 and 5 of the Bankers' Book (Evidence) Act 1949.

[21] The main operative provision in the Bankers' Book (Evidence) Act 1949 is s 7, which allows the court to order a bank to provide to a litigant access to banker's books and to make copies of entries in such books. The bank need not be a party to the proceedings. There must, however, be proceedings afoot, and the Bankers' Book (Evidence) Act 1949 does not envisage the ability to obtain pre-action discovery against a bank.

[22] Section 6 relieves banks from the obligation to produce any banker's books pursuant to a *subpoena duces tecum*. Thus a court will not generally have any power to order an officer of a bank to produce any banker's book where the contents of such books can be proved pursuant to the provision of the Bankers' Book (Evidence) Act 1949. There is, however, still a residual power of the court to compel production of any banker's books by order made 'for a special cause'. The Bankers' Book (Evidence) Act 1949 does not provide guidance on the meaning of 'special cause' in this context, but logic dictates that there must be a specific application made to the court for the production of records relating to specific transactions. It seems to me that a court would also be entitled to compel production pursuant to the 'special cause' proviso under s 6 where a bank has failed to comply with a prior order granted under s 7, or where there is a dispute as to the accuracy of the copy attempted to be admitted into evidence. In *Douglas v Pindling* [1996] AC 890, the Judicial Committee of the Privy Council, on appeal from the Bahamas, held that an order may be made for special cause in order for originals of the banker's books to be produced, rather than mere copies.

[23] Section 130(3) of the Evidence Act 1950 amplifies the position under s 6, by providing:

> (3) No bank shall be compelled to produce its books in any legal proceeding to which it is not a party, except as provided by the law of evidence relating to banker's books.

[24] Despite the marginal note, which states: 'Production of title deeds of witness not a party', it will be seen from its plain words that sub-s (3) is in fact of general application and is not just limited to title deeds. The phrase 'its books' in s 130(3) must necessarily be read to mean 'banker's books' as defined in the Bankers' Book (Evidence) Act 1949.

[25] This leads the discussion into what is meant by 'banker's books', which is considered in the following paragraphs.

THE MEANING OF 'BANKER'S BOOKS'

[26] The Bankers' Book (Evidence) Act 1949 applies only to 'banker's books'. This statement would appear to be so blindingly obvious that it is almost perverse to have to mention it.

[27] Things, however, are seldom as simple as they first appear.

[28] There are a number English cases that have dealt with the definition of 'banker's books' under the English (the expression 'English' and its cognates is used passim as a shorthand to refer to legal jurisdiction of England and Wales) Bankers' Book (Evidence) Act 1879. These cases must however be considered with care, as the 1879 Act has been amended (or modernised) such that the definition of banker's books now reads as follows:

> Expressions in this Act relating to 'bankers' books' include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.

[29] Prior to 1979, the definition of 'banker's books' in the 1879 Act appear to be in pari materia with the Malaysian provisions.

[30] As mentioned previously, even though the term 'banker's books' is defined non-exhaustively, a banker's book must be a book used in the ordinary business of a bank. It must also be construed *ejusdem generis* with ledger, day book, cash book and account book: *Re Howglen Ltd* [2001] 1 All ER 376 (decided under the amended English Bankers' Book Evidence Act 1879). In that case, it was held that the term 'banker's book' does not cover records kept by the bank of conversations between employees of the bank and its customers. In the case of *Idiots' Asylum v Handysides* (1906) 22 TLR 573, the term was defined broadly as any form of permanent record maintained by a bank in relation to the transactions of a customer.

[31] In *Williams v Williams* [1988] 1 QB 161 (also decided under the updated 1879 Act), the Court of Appeal held that unsorted bundles of cheques do not form part of any banker's books. The particular facts of this case bear further examination. The plaintiff wife in this case sought, in matrimonial proceedings against the husband, to inspect cheques issued by a 'charitable' organisation of which her husband was chairman. The inter-bank and inter-branch credit and debit statements did not record the payee of the cheques, but merely the cheque numbers. Evidence was received in this case

A that Barclays Bank processed cheques using an electronic reader-sorter. Once processed, the cheques are returned to the paying branch, where they sit in unsorted bundles, unless the customer requests for their return. Approximately 3.5 to 4% of the cheques turn out not to be machine readable, in which event the cheques are photographed on microfilm and dealt with manually. Sir John
B Donaldson MR held:

> Whilst I would be prepared to accept that the cheques constitute part of the bank's records used in the ordinary business of the bank ..., I am quite unable to accept that adding an individual cheque or paying-in slip can be regarded as making an 'entry' in those records. Putting the matter in another way, 'other records' in the new
C definition has, I think, to be construed ejusdem generis with 'ledgers, day books, cash books [and] account books' and unsorted bundles of cheques and paying-in slips are not 'other records' within the meaning of the Act.

D **[32]** It has to be appreciated that in *Williams v Williams*, the Court of Appeal accepted that, whatever records that Mrs Williams was unable to obtain via an order under the 1879 Act, would be discoverable by her pursuant to a *subpoena duces tecum*. It is noted in this regard that s 6 of the 1879 Act is in pari materia with our s 6 (which provides for non-compellability of bank witnesses in
E respect of the production of banker's books). This stands to reason, as the Bankers' Book (Evidence) Act 1949 was intended to relieve a bank from the inconvenience of having its books tied up as evidence in court. If what is sought to be produced are not the books of the bank that it uses on a day-to-day basis, then the fact that an officer of the bank may be called to court to produce the
F original of that document would not materially disrupt the business of the bank.

[33] The Court of Appeal in *Williams v Williams* considered, but distinguished, the earlier High Court case of *Barker v Wilson* [1980] 1 WLR
G 884, which was decided under the law prior to the 1979 amendments to the 1879 Act. Wilson was a detective constable who was investigating the alleged theft by Barker from his employer. Wilson sought for an order under the 1879 Act for the records of cheques that had been drawn by the Barker over a number of years. The cheques were required by the police in order to ascertain who the
H payees of the cheques were. These cheques were recorded on microfilm that were kept by the bank.

[34] The court found that the microfilm images of the cheques formed part of banker's books within the meaning of the 1879 Act, even though in ordinary
I language microfilm would not usually be called a book. The microfilm was a record of the transactions that had been undertaken by Barker at the bank, and so quite clearly formed part of banker's books.

[35] The point of distinction between *Williams v Williams* and *Barker v*

Wilson is this. Where the cheques are kept by the bank in unsorted bundles after they have been processed by an automated cheque reader, these cheques will not form part of banker's books. Where however, as part of the processing procedures, an image of each cheque is recorded on microfilm, that microfilm would form a part of banker's books. Much therefore depends on how the bank processes the documents that it has in its possession, in order to ascertain whether any particular document comes within the meaning of banker's books.

[36] Bridge LJ held:

> The Bankers' Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of 'bankers' books' and the phrase 'an entry in a banker's book', it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm.

[37] I take a similarly expansive view of the word 'books' within the definition of 'banker's books' under the Bankers' Book (Evidence) Act 1949. The expression is wide enough, in my view, to encompass any matter coming within the definition of 'document' within the meaning of the Evidence Act 1950.

[38] In my view, in order to come within the definition of 'banker's books', a document:

(a) must comprise any transaction record that is generated by the bank; or

(b) must be a document which the bank maintains,

for the purposes of accounting, audit, reconciliation or reporting.

[39] The bank may be in possession of third party documents as part of the conduct of its business in the ordinary course. For example, the know-your-client or credit evaluation procedures of a bank may require it to obtain the constituent documents of a borrower, the salary slips of a customer, or the financial projections for a project undertaken by a borrower. All these are not documents generated by the bank and hence cannot be proved by the facility provided by the Bankers' Book (Evidence) Act 1949. If for any reason a copy of such a document has been obtained from the records of the bank, then that document would be subject to the ordinary rules of evidence, including the rule against hearsay. The document may not be adduced to prove the truth of its contents, without the maker also being called. It may however be adduced to show that it had been given to the bank. If it is sought to be proved against the maker of the document, then it may be admissible as an admission of a fact in issue, pursuant to ss 17 and 21 of the Evidence Act 1950.

[40] On the other hand, there may exist documents that are generated by the bank but does not comprise a record of any transaction undertaken by or with the bank. An example would be marketing brochures or pamphlets produced by the bank. These indisputably are not 'banker's books'.

[41] I am of the view that statements issued by a bank to its customer would not come within the meaning of banker's books, on the basis that such statements would not have been generated by the bank for the purposes of accounting, reconciliation, audit or reporting. The aim of the Bankers' Book (Evidence) Act 1949 is to relieve the bank from having to produce originals of records that it keeps for its own internal purposes. A bank statement is given by the bank to its customer not for the purposes of recording a transaction in the books of the bank, but rather to inform the customer of what balances are standing to the credit in the customer's account with the bank, and of what transactions have been undertaken since the last statement date. The information contained in the statements would be derived from entries in the banker's books, but the statements themselves are not banker's books.

[42] The practical effect of the provisions are as follows:

(a) if the document sought is within the meaning of banker's books and a copy of the relevant entries are provided, then the party seeking to adduce the document will have to comply with ss 4–5 of the Bankers' Book (Evidence) Act 1949;

(b) if the document is within the meaning of banker's books and an original has been provided (such as a print-out of data stored within a computer system operated and maintained by the bank), there is then no need for compliance with ss 4–5. All that is necessary is for a certificate pursuant to s 90A(2) of the Evidence Act 1950 to be provided by a person responsible for the management of the operation of the computer system in the bank. It does appear, however that the certificate must be tendered through its maker, unless parties agree otherwise. This leaves us with the somewhat unsatisfactory position that a copy of entries of a banker's book may be tendered via an affidavit by a bank officer, whereas an original of electronic entries of accounts maintained by the bank will still require an officer of the bank to testify at trial; and

(c) if the document sought is not within the meaning of banker's books, then the usual procedures relating to third party discovery will apply. A bank officer in possession or control of such a document would also be compellable in the same manner as any other witness.

[43] If a document is, for whatever reason, disclosed by a bank pursuant to an order granted under s 7 of the Bankers' Book (Evidence) Act 1949, but that document is not a document that comes within the definition of banker's

books, the party in receipt of such document would be entitled to adduce that document at trial, subject to fulfilment of the requirements for proof and relevancy. Thus, if a bank to whom an order under s 7 applies inadvertently or mistakenly discloses to the party in whose favour the order had been granted a document that does not come within the definition of banker's books, then that party must prove the document in the usual course. The original must be produced, unless the requirements for the reception of secondary evidence have been fulfilled. The maker of the document must be called, unless one of the exceptions to rule against hearsay applies.

[44] All documents received by a party from a bank pursuant to a s 7 order would be subject to an implied undertaking that they not to be used otherwise than for the proper conduct of the action: *Extreme System Sdn Bhd v Ho Hup Construction Company Bhd & Ors* [2010] MLJU 1608; [2011] 10 CLJ 186; [2010] 11 MLRH 820. In my view, this applies regardless of whether the documents received come within the definition of banker's books.

THE TEST TO BE APPLIED IN GRANTING A SECTION 7 ORDER

[45] In determining whether to grant an order under s 7 of the Bankers' Book (Evidence) Act 1949, the courts are to apply the general rules applicable in an application for discovery: *South Staffordshire Tramways Company v Ebbsmith* [1895] 2 QB 669.

[46] The test is thus one of relevancy to the plaintiff's case. Guidance as to whether a document sought is relevant is found in the following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd v Bhupendra KJ Shan (T/A JB International)* [1990] 2 MLJ 282; [1989] 3 MLRH 223:

> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may — not which must — either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co Ltd v Davies* [1938] 1 KB 196 at p 210.

[47] In examining the relevancy or materiality of the plaintiffs' application for discovery to a fact in issue, the plaintiffs' case must be assumed to be true: see *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581; [1993] 4 MLRH 380, where Edgar Joseph Jr SCJ, delivering the decision at the High Court, cited with approval the following

A passage from *The Principles and Practice of Discovery* by Edward Bray:

> ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

B

[48] In *South Staffordshire Tramways Company v Ebbsmith,* the English Court of Appeal held that, once the person in respect of whose accounts inspection is sought avers an affidavit to the effect that the documents or information sought are irrelevant, then the court ought not order the inspection. The relevant C passages of the judgment bears setting out in extenso:

> This is an application for inspection before the trial; and it appears to me that, where such an inspection is asked for, the conduct of the court in the exercise of this jurisdiction ought to be regulated by the general rules laid down by the decisions in relation to inspection of documents before the trial. It was the rule of the Court of D Chancery, where such an inspection of documents was asked for, that the court granted it subject to this, namely, that, if in answer to the application the defendant pledged his oath to the fact that certain entries were irrelevant to the matters in dispute, the Court accepted that answer, leaving the defendant exposed to the risk of a prosecution for perjury, if it was untrue. I think that in exercising its jurisdiction under the 7th section of the Bankers' Books Evidence Act 1879, the court ought to E be governed by the same rule. The defendant has taken upon himself to pledge his oath that the items which he gives from his banking account are the only items relevant to the matters in issue between him and the plaintiffs; and I think that for the time the court must accept that statement on oath, and, as he cannot at the present stage of the proceedings be cross-examined upon it, the court must act upon F that statement. The court must, therefore, refuse to order the inspection applied for before the trial, leaving it to the judge at the trial to make such order as he may think fit in the matter.

[49] In my judgment, the views expressed in the passage quoted above no G longer reflect the general rules governing discovery. The principal test is one of relevancy, and as explained, the plaintiff's assertions must be assumed to be true in assessing the relevance of the information sought to be obtained by the order of discovery or inspection. Accordingly, while the decision in *South Staffordshire Tramways v Ebbsmith* may be properly cited for the general rule H that the principles governing discovery apply in determining whether or not an order for inspection ought to be granted under the Bankers' Book (Evidence) Act 1949, it cannot be relied upon for the purposes of determining what those discovery principles are, for much water has flowed under the bridge since 1895.

I

[50] Applying the test of relevancy to the facts of the application in encl 307, I was of the view that the inspection of the banker's books ought to be allowed, as it would go towards establishing the plaintiff's case against the second and third defendants. The information obtained from an inspection of the accounts

and other books held by the banks would establish the money trail, and would determine whether or not the money paid by the plaintiff under the share acquisition had found its way back into accounts controlled by the second and third defendants. For this reason, I allowed the application.

THE DEFENDANTS' OBJECTIONS

[51] It will be recalled that the second and third defendants objected to the plaintiff's application on three grounds:

(a) it was argued that the application under the Bankers' Book (Evidence) Act 1949 was misconceived and an abuse of process, having regard to the legislative intent of the Bankers' Book (Evidence) Act 1949 and the provisions for third party discovery under O 24 r 7A of the Rules of Court 2012. Because of this — it was argued — the court did not have the jurisdiction to grant the orders prayed for;

(b) it was argued that the application for discovery was a mere fishing expedition; and

(c) finally, it was contended that the plaintiff has, by the application under the Bankers' Book (Evidence) Act 1949, sought in effect to reverse the burden of proof, which is impermissible in law.

[52] These objections are addressed in turn in the following paragraphs.

ABUSE OF PROCESS

[53] Dato' Malek Imtiaz for the second and third defendants argued with that the legislative intent of the Bankers' Book (Evidence) Act 1949 was to relieve banks from the inconvenience of having to tender their books into evidence in response to a *subpoena duces tecum*, but does not provide parties with an independent right of discovery. It was also argued that the Bankers' Book (Evidence) Act 1949 merely provides for a facility by which entries in banker's book may be proved, but does not allow the document themselves to be obtained. Thus, according to this argument, it is only if the plaintiff already has a copy of the document but wishes to obtain the original for the purposes of admitting that document into evidence at trial, that it may proceed under the Bankers' Book (Evidence) Act 1949.

[54] The argument may be summed up thus: the Bankers' Book (Evidence) Act 1949 only facilitates proof of evidence, but does not permit evidence to be obtained where none had previously existed in the hands of the plaintiff.

[55] Respectfully, I am of the view that Dato' Malek is only half correct. While it is indisputably true that the intent of the legislation was to provide

relief to bankers from the inconvenience of having their ledgers and other books from being removed for use in legal proceedings, the Act also, as a necessary consequence, provides for a right of inspection over a banker's books as well as a right to obtain copies of entries in those books.

[56] In *Williams v Williams*, the legislative intent was explained in the following manner:

> The first Bankers' Books Evidence Act was enacted in 1876. Its purpose was set out in the preamble:
>
> > WHEREAS serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings: And whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books: Be it therefore enacted [etc].
>
> The way this was achieved was by providing that entries in the bank's books should be admissible as prima facie evidence of the 'matters, transactions, and accounts recorded therein', subject to verification by the bank's officers and that copies of all such entries should be admissible in evidence without production of the originals.

[57] In *Arnott v Hayes* (1887) 36 Ch D 731, Fry LJ held as follows:

> [A]s to the general construction of the Act, it is said that this order gives the Plaintiff a discovery of documents which he has no right to inspect. But this inspection is necessary for the purposes of the Act. Before the Act it was necessary to call the banker by a *subpoena duces tecum*, and the party could not see the books till they were put in. The books are not now to be produced, but copies are to be used. How are copies to be obtained? The party requiring them cannot call on his adversary for copies; he therefore must himself make a copy, and he must have liberty to look at the books for that purpose.
>
> The legislation on this subject began in 1876. The Act of that year in its preamble states two objects: 'Whereas serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings, and whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books'. I see no reason to suppose that when the Act of 1879 was substituted for this Act, the Legislature had not the same two motives. I think, therefore, that the facilitating the proof of the transactions recorded in the books was as much an object of the Act as the relief of bankers. *The right to inspection appears to me a necessary result of the provisions of the Act*. (Emphasis added.)

[58] It is therefore incorrect to say that the Bankers' Book (Evidence) Act 1949 may not be used by a party to obtain evidence where none previously existed in the hands of that party. The plaintiff here was well entitled to seek inspection of the banker's books, and to make copies of entries in such books, in order to prove its assertion regarding the flow of funds back to the second

and third defendants. Whether or not the court ought to grant the order will depend on the proper application of the principles of discovery. I have held that the test of relevancy has been fulfilled and so granted the orders prayed for.

[59] This construction is supported by the plain words of s 7, which in no uncertain terms provide for the right to inspect banker's books and to take copies of entries in such books.

[60] It was also advanced for the second and third defendants that the plaintiff must instead proceed to apply for third party discovery under O 24 r 7A(2) of the Rules of Court 2012.

[61] I am of the view that this is correct only in so far as what is sought to be discovered does not come within the definition of 'banker's books'. If the document that is sought is comprised within the definition of banker's books, then the only way in which the plaintiff is able to obtain a copy of that document is by way of an application under s 7. This is due to the operation of s 6, read together with s 130(3) of the Evidence Act 1950. If the document is not encompassed in the definition of banker's books, then as explained in para 42(c), the proper way would be for the plaintiff to seek third-party discovery against the bank in question, or to subpoena an officer of the bank at trial.

[62] For the reasons explained above, I disagree that the court does not have the jurisdiction to grant the orders prayed for in encl 307.

[63] The next question is, what if the bank had delivered to the plaintiff documents that were not within the definition of 'banker's books'? I have addressed this point in para 43: the plaintiff may rely upon them subject to satisfaction of the usual requirements regarding proof and relevancy.

MERE FISHING EXPEDITION

[64] It was advanced for the second and third defendants that the plaintiff's application was a mere fishing expedition. Such an application ought not be countenanced by the court:

> [T]he court would dismiss a plaintiff's application for discovery if it is of the view that the plaintiff was 'merely fishing for evidence to prop up his case' and to allow him discovery would be unduly oppressive to the party giving discovery — see *Leslie S Holmes v Engineering Service Inc* [1993] 1 AMR 27 at p 36 (*Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40; [2009] 5 MLRA 631 (CA)).

[65] An explanation of what amounts to impermissible fishing is contained in the decision of the Federal Court of Australia, exercising its appellate jurisdiction, in *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559:

> Though the power to require discovery be acknowledged, how should it be exercised? It depends upon the nature of the case and the stage of the proceedings at which the discovery is sought. In the present case, discovery is sought before there is a tittle of evidence to suggest that the Chairman did not have the requisite cause to believe which para 6 of the statement of claim would put in issue. Some assistance was sought to be derived from cases where discovery had been given to a party before he was required to give particulars of his claim: cases such as *Ross v Blake's Motors* [1951] 2 All ER 689, but in cases of that kind there is either an anterior relationship between the parties which entitles one to obtain information from the other, or *sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery*. This is not such a case. *This is a case where a bare allegation is made by para 6 of the statement of claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing*. As Smithers J said in *Melbourne Home of Ford Pty Ltd v Trade Practices Commission*, (5 TPC at 35; ATPR at 18,087: 'In the absence of such evidence the proceeding is essentially speculative in nature. In such circumstances for the Court to assist the applicants by making available to them the processes of interrogatories and discovery would be to assist them in an essentially fishing exercise and from this the Court on established principles should refrain'. His Honour's refusal of discovery was right and it ought not to be disturbed. (Emphasis added.)

[66] Having examined the statement of claim, I am of the view that there are sufficient pleaded facts to show that the plaintiffs do in fact have a case that may be aided by an order of discovery, and that, as a consequence, the application for discovery is not a mere fishing exercise.

[67] The facts of the present case can clearly be distinguished from *WA Pines Pty Ltd v Bannerman.* The application in encl 307 was not grounded upon a bare assertion in the statement of claim. The objective and undisputed facts show that there indeed had been an acquisition of shares and that substantial amounts have been paid over to the seller of the shares, being the first defendant. It cannot reasonably be disputed that the flow of money would be a material piece of information that would go towards establishing or indeed disproving the claim of the plaintiff. If it can be shown that the money never touched any accounts owned or controlled by the second and third defendants, this information would, in my view, tend to exculpate them from some or all of the charges against them.

IMPERMISSIBLE TO REVERSE THE BURDEN OF PROOF

[68] The third objection advanced for the second and third defendants was the contention that the plaintiff has, by the application under the Bankers' Book (Evidence) Act 1949, sought in effect to reverse the burden of proof, which is impermissible in law.

[69] Reliance was placed on the case of *Kenwood Electronics (Malaysia) Sdn Bhd v People's Audio Sdn Bhd & Ors* [2003] 5 MLJ 276; [2003] 2 AMR 70; [2003] 5 CLJ 436; [2002] 3 MLRH 877 in this case, the plaintiff was the local distributor of the Kenwood brand of consumer electronics. It sold goods to the first defendant, but was never paid for them. The plaintiff obtained judgment against the first defendant, but the judgment remained unsatisfied. The plaintiff alleged that the remaining defendants had in fact sold the goods through another company and had kept the proceeds to themselves. The plaintiff sought discovery of, among others, invoices, receipts and bank statements in the possession of the defendants, in order to prove its claim of conspiracy against the second to fourth defendants.

[70] The High Court declined to grant the order, in part because an order to compel the defendants to disclose and produce the documents sought would have the effect of shifting the legal burden of proof of conspiracy from the plaintiff to the second to fourth defendants.

[71] In my considered judgment, the case of *Kenwood Electronics (Malaysia) v People's Audio* can be distinguished because in the present case, the order under s 7 of the Bankers' Book (Evidence) Act 1949 was not sought against the defendants, but rather against third parties, ie the banks. If it is not the defendants who will be the subjected to the court order, then it can never be said that the legal burden of proof has shifted. The second and third defendants here were not being asked to disclose any matter.

ENCLOSURE 395

[72] On the first day of trial in this case, the question of the admissibility of the documents received by the plaintiff from the banks came to be considered. The plaintiff elected to make a formal application for an order from the court, to which counsel for the second and third defendants did not object. It was the parties' common position that the questions regarding the scope of the Bankers' Book (Evidence) Act 1949 and its interrelation with the general law of discovery would have a material impact on the issue of admissibility of the documents sought to be relied upon by the plaintiff. For this reason, the parties came to a consensus for a judgment to be delivered on these issues and for final determination of these issues to be decided on appeal. It was for this reason that

the plaintiff filed its application in encl 395, seeking a determination that the documents obtained pursuant to the two s 7 applications in encls 48 and 307 be admitted as evidence and marked as exhibits.

[73] I have set out in this judgment *passim* the applicable principles to be applied in making such a determination. However, I am not able to allow the relevant documents to be admitted into evidence without first addressing the following matters:

(a) the court must first make a determination whether a document sought to be adduced comes within the definition of 'banker's books'. This is a mixed question of fact and law, and it may not be obvious from the face of every document that they fulfil the requirements that I have articulated at para 38 *ante*. Accordingly, evidence may well have to be led as to the purpose for which the bank had generated, or maintained a record of, the document in question; and

(b) once this determination is made, then the plaintiff will have to satisfy the court that:

(i) in the case of a copy of an entry in a banker's book, the requirements of ss 4 and 5 of the Bankers' Book (Evidence) Act 1949 have been fulfilled; and

(ii) in any other case, the requirements relating to proof of a document and its relevancy and admissibility have been fulfilled.

[74] Nonetheless, the guidance that I have provided in this judgment in the form of the general applicable principles should substantially address the issues raised in argument before me.

[75] I had directed that parties bear their own costs in relation to encl 307. I make the same direction in respect of encl 395.

Order accordingly.

Reported by Izzat Fauzan